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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 265

M & M TRANSPORTATION COMPANY and STONE'S EXPRESS, INC.,
Appellants,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees,

and

ST. JOHNSBURY TRUCKING COMPANY, INC., and HINSCH TRANSPORTATION CO., INC.,
Intervener Appellees.

JURISDICTIONAL STATEMENT

On Appeal from the Judgment of the United States District Court, District of Massachusetts

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AUTHORITIES AND PUBLICATIONS CITED

Administrative Procedure Act, Legislative History, Senate Document No. 248, page 272, page 86 21

Frankfurter, The Task of Administrative Law, 75 U. of Pa. L. Rev. 614 15

Interstate Commerce Commission Sixty-Eighth Annual Report (1954) 7

Landis, The Administrative Process, pages 105-106 21

Landis, Symposium on American Administrative Law, 9 Am. L. School Rev. 181 21

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St. Johnsbury Trucking Company, Inc., and Hinsch Transportation Co., Inc.,
Intervener Appellees.

On Appeal from the Judgment of the United States District Court, District of Massachusetts

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Massachusetts entered on January 25, 1955, dismissing their complaint in an action to set aside an order of the Interstate Commerce Commission and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The majority and concurring opinions of the District Court for the District of Massachusetts are reported in 128 F. Supp. 296 and annexed hereto as Appendix A. The opinions of the Interstate Commerce Commission are reported in 59 M.C.C. 747 and 60 M.C.C. 129.

Jurisdiction

This suit was instituted, under the provisions of 28 U.S.C. Section 1336, 2321-2325, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on January 25, 1955 and notice of appeal was filed in that Court on March 11, 1955.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33; *United States* v. *Capital Transit Company*, 338 U. S. 286; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515; *McLean Trucking Company Inc.* v. *United States*, 321 U. S. 67; *Florida* v. *United States*, 282 U. S. 194.

Questions Presented

1. Does the phrase "consistent with the public interest" as contained in Section 5(2)(b) of the Interstate Commerce Act (49 U. S. C. Section 5(2)(b)) require an affirmative and basic finding that the proposed unified motor carrier service will be responsive to the transportation needs of the shipping public and did the District Court commit error

n it held that the phrase means, in effect, "not incon-
nt with the public interest" and, therefore, is, as the
urring opinion suggests (Appendix "A", p. 34) de-
otive of a "mere neutral status."

May the Interstate Commerce Commission approve
pplication for the unification of two motor carriers,
r Section 5(2)(b) and (c) of the Interstate Commerce
where it fails to find that there is a public need for
nified service.

Where the District Court, upon review of an order
he Interstate Commerce Commission, concludes that
finding of fact, which it does not identify, is not
orted by substantial evidence, must the order of the
rstate Commerce Commission be vacated.

Did the order of the Interstate Commerce Commis-
approving the unification of two motor carriers under
ion 5(2)(b) constitute a departure from prior norms
out an adequate explanation so that its order must be
ted.

Did the Interstate Commerce Commission, in its order
roving the application under Section 5(2)(b), make
uate and basic findings and were the findings, as made,
orted by substantial evidence on the whole record.

Did the denial by the District Court of the Appel-
s' request, under Rule 36 of the Rules of Civil Pro-
re for the United States District Court, for an admis-
that the Commissioners of the Interstate Commerce
mission did not have the whole record before them
r to the issuance of their final order constitute a de-
of due process of law and a violation of the Adminis-
ve Procedure Act and may the Commissioners of the
rstate Commerce Commission be required to disclose
ther the whole record of the proceedings were before
n before the issuance of a final order.

Statutes Involved

Sections 5(2)(a)(b)(c)(e), 209(b) and 410(c) (49 U.S.C. Sections 5(2)(a)(b)(c)(e), 309(b) and 1010(c)) of the Interstate Commerce Act, as amended, and Sections 7(c) and 10(e) (5 U.S.C. Sections 1006(c) and 1009(e)) of the Administrative Procedure Act.

Statement

Appellants are motor carriers engaged in the transportation of general commodities in interstate commerce under Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission.

Prior to November 27, 1951, St. Johnsbury Trucking Company, Inc. (hereinafter called "St. Johnsbury") was engaged in the transportation of general commodities over regular routes extending from Boston and Springfield, Massachusetts to all points in Vermont and many of the principal points in New Hampshire and Maine. Hinsch Transportation Co., Inc. (hereinafter called "Hinsch") was authorized to transport general commodities over regular routes between Boston, Massachusetts and New York, New York.

On November 27, 1951, St. Johnsbury filed an application under Section 5(2)(b) of the Interstate Commerce Act (herein called the Section 5 application) to acquire Hinsch's Certificate of Public Convenience and Necessity. The object of the application was to unify the operating authorities of St. Johnsbury and Hinsch so that through service could be performed by St. Johnsbury between Maine, New Hampshire and Vermont, on the one hand, and New York, points in New Jersey and points in Connecticut, on the other. In addition, approval of the application would authorize St. Johnsbury to institute service between Boston, Massachusetts, on the one hand, and New York points

in New Jersey, points in Rhode Island and points in Connecticut, on the other.[1]

The Section 5 application was heard by an Examiner of the Commission who recommended that the Commission approve so much of the application as would authorize St. Johnsbury to transport general commodities between points in the New York-New Jersey area, on the one hand, and points in Maine. In all other respects, the Examiner recommended a denial of the application.

On July 2, 1953, Division 4 of the Commission denied the Section 5 application in its entirety (59 M.C.C. 419). On January 19, 1954, the Commission, acting upon a petition for reconsideration filed by St. Johnsbury and Hinsch, reversed Division 4 and approved the application (59 M.C.C. 747). The appellant, M & M Transportation Company, thereafter filed a petition for reconsideration. Similar petitions were filed by other protestants and intervening carriers and, on March 15, 1954, the Commission entered an order denying the petition of M & M Transportation Company, but upon the petition of other intervenors, reopened the proceedings for reconsideration on the existing record. On April 5, 1954, the Commission modified its findings, but approved the application (60 M.C.C. 129).

Appellants brought this action in the United States District Court for the District of Massachusetts under Title 28 U.S.C. Sections 1336 and 2321-2325 to set aside the order of the Commission of January 19, 1954, as modified by the order of the Commission of April 5, 1954.

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[1] On December 18, 1951, Division 4 of the Commission, acting under the provisions of Section 210a(b) of the Interstate Commerce Act, authorized St. Johnsbury to temporarily operate under Hinsch's certificate. The temporary authority thus granted was extended, but in a proceeding in the United States District Court for the District of Massachusetts, the order granting the extension was enjoined. *Stone's Express, Inc.* v. *United States*, 122 F. Supp. 955. This injunction was stayed pending appeal by the Commission to the Supreme Court (No. 233; 363).

The District Court dismissed the complaint holding that the basic findings required by Section 5(2)(c) of the Interstate Commerce Act were made by the Commission and that the phrase "consistent with the public interest" does not require a finding by the Commission of a public need for the proposed service (Appendix "A", pp. 30, 32).

The District Court read the provisions of Section 5(2)(c) into, and as a substitute for, Section 5(2)(b). The latter prescribes the findings which must be made, namely, that the proposed transaction "is within the scope of subparagraph (a) and will be consistent with the public interest * * *." Section 5(2)(c) does not describe the basic findings as the District Court incorrectly assumes (Appendix "A", p. 27) but illustrates the considerations which the Commission must weigh in making the basic findings required by Section 5(2)(b).

Finally, the District Court held that one finding "appears to be without substantial support, but we have not the slightest reason to infer that without this finding the Commission's ultimate conclusion would have been any different" (Appendix "A", p. 33). The deficient finding is nowhere identified.

The concurring opinion reluctantly accepts the suggestion that the Commission's ultimate conclusion would have been the same even without the one finding and rejects the majority opinion that the term "consistent with the public interest" is a meaningless synonym for "not inconsistent" or a "neutral" term (Appendix "A", pp. 33, 34).

The Questions Are Substantial

The questions presented by this appeal involve matters of profound economic significance and grave legal consequence. Since 1935, when the Motor Carrier Act was adopted, there has been a progressive concentration of

motor carrier facilities through mergers and unifications. In less than twenty years, the trend towards monopoly and the emergence of large entreprenurial units have become the characteristic signs of the motor carrier industry. Thus, the Interstate Commerce Commission reported:

> "A large number of applications to purchase or acquire control of motor carriers by other motor carriers have been received during the year, a considerable proportion of which have received our approval. The trend towards larger units in the field of motor property operations which results from such unifications and other factors is indicated to some extent by the fact that, in 1940, class I carriers accounted for about 4 percent of all motor property carriers subject to our jurisdiction and, according to staff estimates, for 55 percent of the total operating revenues, whereas in 1953 they constituted 13 percent of the carriers and received 79 percent of the revenues. In 1950 the minimum revenue required for qualification as a class I carrier was raised from $100,000 to $200,000. While this change must be reckoned with, it may be noted that carriers having $1,000,000 or more of revenue were 22.6 percent of all class I intercity carriers in 1948 and accounted for 66.7 percent of that year's total revenue of class I carriers, while in 1952 their group of larger carriers represented 38.5 percent of the carriers and their revenue was 79.6 percent of the total. The concentration was greater for common carriers of general freight, as 46.5 percent of such carriers had $1,000,000 or more of revenue and their revenues were 85.7 percent of the group revenue." Interstate Commerce Commission Sixty-Eighth Annual Report (1954.)

An application under Section 5(2)(b) involves intensive and costly preparation and, frequently, protracted hearings and litigation. The urgent, if not imperative, need for a definitive construction of Section 5(2)(b) is reflected, in part, by the complaints of lawyer practitioners, that they

experienced difficulty in reconciling decisions by the Commission in Section 5 proceedings.[2]

Until guideposts are provided by the Supreme Court, a substantial number of decisions by the Commission will continue to be irreconcilable, rather than merely inconsistent, and the quasi-judicial process will degenerate into a series of *ad hoc* determinations.

A considerable number of cases challenging orders of the Commission in Section 5 proceedings reach various District Courts. Few of these cases are appealed to the Supreme Court. The miscellany of decisions fails to provide reliable precedents. A decision by the Supreme Court on the issue presented in this cause would serve to promote efficient judicial administration.

The decision by the Commission in the St. Johnsbury-Hinsch application proceedings is illustrative not only of an abandonment of its settled construction of Section 5(2)(b) and (c), but in conflict with the statute and the decisional precedents of this Court.

By its dismissal of the complaint, the District Court has embraced, though it rationalized, the errors committed by the Commission; it has misconstrued the statute, has disregarded its duty under the Administrative Procedure Act and has rejected standards for judicial review enunciated by the Supreme Court.

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[2] The Motor Carrier Lawyers' Association conducted a survey among its members to elicit views on the current trend of the Commission's decisions. 81% of those who responded replied that they had "difficulty in reconciling and distinguishing various factors of consideration by the Commission." 70% "felt that the Commission should make a clear declaration of its policies and principles * * *." One lawyer commented that Section 5 decisions are "terribly confusing, inconsistent and often times, incoherent and without justification." (Letter of the Law, Vol. II, No. 3 February 1955 pub. Motor Carrier Lawyers' Assn. p. 3-A.)

1. The Interstate Commerce Act, Part II (49 U. S. C. Section 301 et seq.) was designed to regulate the operations of interstate motor carriers by establishing, among other things, standards for the merger and unification of motor carriers.

Section 5(2)(b) of the Interstate Commerce Act permits the acquisition by one motor carrier of the operating property of another provided that the Commission finds that the proposed transaction will be consistent with the public interest.

Section 5(2)(c) describes certain of the considerations to be weighed by the Commission in "passing upon any proposed transaction under the provisions" of Section 5. The criteria expressly set forth are "among others" which must guide the Commission.

Clearly, the key statutory phrase is "consistent with the public interest". While the Supreme Court has reviewed decisions involving orders of the Interstate Commerce Commission approving applications under Section 5(2)(b), the question as to the requirement for proof and a finding of public need for a proposed unified service has never been resolved.

The District Court held, as the concurring opinion points up, that "consistent with the public interest" is either meaningless, or supererogatory or, at best, means "not inconsistent with the public interest" (Appendix "A", pp. 34, 35). In any event, the District Court rejected the Appellants' contention that the phrase requires a finding of public need (Appendix "A", p. 30). This construction of the phrase is refuted by the statute and has been rejected by the Commission in every case except in the St. Johnsbury-Hinsch application proceedings.

To begin with, in Section 5(2)(c), Congress prescribed aids to construction. If the phrase is meaningless, then its inclusion in Section 5(2)(b) was surplusage; Section

5(2)(c) alone would have sufficed. But the phrase is not meaningless. Section 5 is an integrated and, perhaps, the most precise, segment of the whole Interstate Commerce Act. To illustrate, in Section 5(2)(e), Congress employs the phrases "not inconsistent with the public interest" and "not * * * contrary to public interest." If Congress intended the negative gloss ascribed by the Court to "consistent with the public interest", the two entirely different phrases incorporated in Section 5(2)(e) must be products of legislative irresponsibility or a poverty of ideas. Since, however, Section 5 has been amended many times, the difference in language and context between Section 5(2)(b) and Section 5(2)(e) must be deemed deliberate and considered (24 Stat. 380; 37 Stat. 566; 41 Stat. 480; 48 Stat. 217; 48 Stat. 1080; 49 Stat. 543; 54 Stat. 905; 63 Stat. 485).

In short, the finding required by Section 5(2)(b) is that a proposed transaction will serve the needs of the shipping public, as distinguished from a handful of individual shippers, and the service will be congruent and consistent with the national transportation policy. This basic and ultimate finding must be supported by substantial evidence and in arriving at its decision, the Commission must give weight to the factors prescribed in Section 5(2)(c).

This is not a mere matter of substitution of the words "public need" for "consistent with the public interest." What is involved is the equation of the statutory phrase with the finding that the proposed service is required by the shipping public and the national transportation policy.

If the transportation needs of the shipping public were only a factor, it must be assumed that Congress would have included it in Section 5(2)(c). But is is not a factor; it is the Section 5(2)(b) end result of the processes of consideration as described in Section 5(2)(c).

The negative or neutral status assigned by the District Court to the basic finding "consistent with the public interest" vitiates the affirmative concept of "public interest."

(*New York Central Securities Corporation* v. *United States of America*, 287 U. S. 12, 25; *Texas* v. *United States*, 292 U. S. 522; *United States* v. *Lowden*, 308 U. S. 225.)

The Commission has, except in the *St. Johnsbury-Hinsch* case, consistently required as a condition of approval of a unification, affirmative proof that the proposed service will be responsive to the needs of the shipping public. Indeed, Commissioner Mahaffie, in his dissent (59 M.C.C. 747) said:

> "In granting this application without finding that there is public need for the service proposed to be rendered by vendee (it is true that the evidence wholly fails to support such a finding) the report departs from long established precedent in those cases where, as here, the operations to be acquired have been of little competitive significance."

The leading case decided by the Interstate Commerce Commission is *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc., etc.*, 57 M.C.C. 341, aff'd 57 M.C.C. 467. There, the Interstate Commerce Commission denied a Section 5 application for the following reason:

> "• • • Although there is some evidence that certain benefits would result from the transaction, there is none that the resulting service which would be provided would serve any public need, or that the requirements of the shipping public are not now being adequately met by existing carriers. We are required by the national transportation policy 'to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers'; and paragraph 2(c) of section 5 specifically provides that we must give weight to the 'effect of a proposed transaction upon adequate transportation service to the public.' The words 'public interest' as used in section 5 clearly comprehend the interest of competing carriers. Their interest is no different than that of the general public in preventing the wasteful transportation which results from surplus transportation. Texas v. United States, 292 U. S. 522". (p. 380).

The District Court concludes that the principle of this case was modified by the Commission and its ambit limited. But in *Ringsby Truck Lines, Inc.—Control—Northern Transportation Company,* 58 M.C.C. 594, upon which the District Court relies, the Commission held that the record "affirmatively establishes that the proposed plan of operations would meet a public need * * *" (p. 598).

Precisely this principle has been affirmed in literally scores of decisions by the Commission in Section 5 cases. Moreover, in its construction of the phrase "consistent with the public interest", as it appears in Section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b)), the Commission abandoned its early construction of the phrase as the equivalent of "not hostile to the public interest" and thereafter approved or denied applications for contract carrier permits depending upon the absence or presence of proof of public need for the service. *William Heim Cartage Company Incorporated—Extension of Operations—Indianapolis,* 20 M.C.C. 329; *E. H. Shoemaker Contract Carrier Application,* 53 M.C.C. 246; *Cumberland Automobile and Truck Company, Inc.—Extension—19 States,* 52 M.C.C. 772; *Jack Hudson, Inc., Contract Carrier Application,* 54 M.C.C. 681; *Clyde R. Sauers, Extension—East Cambridge, Mass.,* 61 M.C.C. 65.

Similarily, in its construction of the phrase "consistent with the public interest" in Section 410(c) of the Interstate Commerce Act (49 U.S.C. 1010(c), the Commission has required proof of public need. *General Carloading Co. Inc. Freight Forwarder Application,* 260 I.C.C. 345; *Carloader Corporation, Freight Forwarder Application,* 260 I.C.C. 401.

It is fundamental that the construction given by an agency to the act it administers is entitled to persuasive weight. *United States* v. *The Alabama Great Southern Railroad Company,* 142 U. S. 615; *United States* v. *American Trucking Associations, Inc.,* 310 U. S. 534.

2. Even if it is to be assumed that the Commission is not required, under Section 5(2)(b), to make the basic finding that a propo ed transaction will be responsive to the transportation needs of the shipping public and if it be assumed that a finding that a proposed service will be consistent with the public interest is sufficient if a mere statement of the statutory language is made, the order in the *St. Johnsbury-Hinsch* case is nevertheless invalid.

Traditionally, the Commission will consider, among the factors described in Section 5(2)(c), the adverse effect of the proposed transaction on competing carriers and "reasonableness of the terms, manner of payment of the total consideration, the effect on the purchaser's financial, stability, the effect on adequate and economical transportation in the territory, and other matters affecting the public interest." *Raymond Bros. M. Transp., Inc.—Purchase—North American,* 37 M.C.C. 431.

In the *St. Johnsbury-Hinsch* case, the Commission said:

> "• • • the record discloses that most of the opposing carriers have enjoyed increased operating revenues and net income for the years 1948 to 1951, when vendee was not a competitor, and that there is no evidence of record warranting the belief that they would be materially harmed by the proposed unification" (59 M.C.C. 747, 758).

Clearly, a finding that opposing carriers enjoyed some prosperity before St. Johnsbury instituted the proposed service is not the equivalent of a finding that there will be no adverse effect on competing carriers. The impact of adverse effect will be felt in the future. Nowhere does the Commission say that there will be no such future adverse effect. Indeed, there is no such evidence to support such a finding. Moreover, the Commission apparently imposes upon the protestants, a burden which St. Johnsbury and Hinsch must assume. The burden was upon them to prove that there would be no adverse effect upon the protestants

and an affirmative finding to that effect was required. Thus, in the *Pacific Intermountain Express Company* case, the Commission, upon reconsideration (57 M.C.C. 467), said:

> "We think that under that section it has been and is our duty to consider the effect which a proposed new unified service will have on the continuance, efficiency and economy of existing carrier services, and, if such proposed new unified service would adversely affect to any substantial extent the continuance, efficiency, and economy of existing carrier services, to the detriment of the public, whether it would result in offsetting advantages to the public and whether approval or disapproval would more nearly conform with the policy of Congress declared in the national transportation policy" (p. 470).

Assuming, *arguendo,* that the transportation needs of the shipping public is only a factor to be weighed under Section 5(2)(c) rather than the basic and ultimate finding required under Section 5(2)(b) a reading of the Commission's opinion in the *St. Johnsbury-Hinsch* case discloses, at once, that this factor was not weighed and no finding, as to public need was made. Thus, the Commission says:

> "The evidence of the representatives of shippers with manufacturing and processing plants at 10 points in Maine, 2 in Vermont and 2 in northern New Jersey, as set forth in detail in the prior report, was generally to the effect that they would continue to utilize the through single-line service of vendee if the transaction were approved and consummated" (58 M.C.C. 747, 757).

A finding that shippers will continue to patronize a given carrier has never been regarded by the Commission as sufficient proof of public need or the equivalent thereof. The preferences of individual shippers (even for an inefficient and unnecessary service) is not tantamount to a statement that the transportation needs of the shipping public, generally, require the proposed service.

In short, at least two basic factors were not weighed and no adequate findings were made with respect thereto. Merely restating the language of the statute and employing the caveat that the service will be consistent with the public interest and "be to the advantage of the shipping public" does not satisfy the statutory requirement for basic and ultimate findings.

Accordingly, if the District Court's construction of the statute is accepted, the Commission's order in the *St. Johnsbury-Hinsch* case must fail because it does not meet the criteria upon which the District Court relied.

3. The appellants do not suggest that consistency is a prerequisite for a valid order. *Georgia Public Service Commission* v. *United States,* 283 U. S. 765; *Virginian Railway Company* v. *United States,* 272 U. S. 658; *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U. S. 194. But a departure from a long established principle must be justified or explained. No such explanation was given by the Commission in the *St. Johnsbury-Hinsch* case.

The District Court misread the decision of this Court in *Secretary of Agriculture of the United States* v. *United States,* 347 U. S. 645. In that case, this Court acknowledged that the Commission did set forth its reasons and findings but it was instructed to make its reasons for departure from prior norms "more explicit" (page 655).

The discretion of the Commission is not unlimited and it cannot adopt principles on an *ad hoc* basis. Frankfurter, The Task of Administrative Law, 75 U. of Pa. L. Rev. 614; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 478; *Howard Hall Company Inc.,* v. *United States,* 315 U. S. 495. *E. Brooke Matlack, Inc.* v. *United States,* 119 F. Supp. 617 (E.D. Pa.).

The District Court makes reference to so-called "extensive findings" by the Commission (Appendix "A", p. 28) but the findings to which the District Court alludes are

these: St. Johnsbury would find a direct line service more convenient for St. Johnsbury insofar as part load shipments are concerned (interchange of full truckload shipments having proved satisfactory); that a balanced operation would inure to the benefit of St. Johnsbury and that some shippers have requested an overnight through service between New England and the New York metropolitan area. But nowhere in the decision by the Commission nor in the opinion of the District Court is there an iota of evidence that the proposed service is responsive to the needs of the shipping public and that these needs are not being met by existing carriers, that the interests of the shipping public would be promoted and advanced by the unification; that additional equipment would be made available to the public and that adequate and efficient service of the kind proposed by the application is not presently available to the public. Concededly, the Commission need not find that existing facilities are inadequate. But it must find that the shipping public requires the proposed service and that the service will serve a useful public function.

In *McLean Trucking Company, Inc. etc.* v. *United States of America, etc.*, 321 U. S. 67, the basic issue involved was the weight to be accorded to the anti-trust policy and competition in a Section 5 proceeding. But it is significant that the Commission found affirmatively that the proposed transaction would provide a more adequate transportation service to the public (38 M.C.C. 137). Thus, the Commission, in the *McLean* case, pointed out that there was an inadequacy of truck facilities, that trucks were being used with insufficient load factors and that the proposed consolidation would serve to increase the availability of trucks, reduce the empty load factor and thereby provide the public with additional facilities. Specifically, the Commission found: "Many carriers are now finding it difficult to provide adequate equipment to meet the needs of the shipping public" (38 M.C.C. 137, 143).

These findings were never challenged in the Supreme Court. Indeed, they were supported by substantial evidence. In the *St. Johnsbury-Hinsch* case, the Commission did not and could not find an existing insufficiency of service or a public need for the service proposed by the application. Nevertheless, without finding public need, the Commission approved the application and substituted a mere statement of the factors described in Section 5(2)(c) for the basic finding of public need. And it may be noted that such findings as were made by the Commission were not supported by substantial evidence. The Examiner and Division 4 found, as the record disclosed, that the shippers involved handled limited commodities and that they acknowledged, on both direct and cross-examination, sufficient service by existing carriers; existing carriers were providing all of the service required by the shipping public and because of the serious competitive situation in the New England area, the proposed unified service would create an adverse competitive effect (59 M.C.C. 419 at p. 445). In this connection, it is singular that when the Commission failed to consider the adverse effect on existing carriers, it not only disregarded the evidence in the record, but the results of an investigation that was conducted at approximately the time when the *St. Johnsbury-Hinsch* case was before it.

In *Motor Carrier Rate, New York City area-New England,* MC-C-1115 (decided July 13, 1954, 10 F.C.C. (CCH Motor Carrier Reports. Paragraph 33,082), the Commission specifically found that more than 50% of the carriers in the New England area had operating ratios in excess of 100 and that financial distress characteristic of these carriers had increased over the prior year.

Accordingly, the Commission disregarded the record and while it repeated many of the facts independently found by the Examiner and Division 4, it capriciously concluded that the transaction was consistent with the public interest. A mere restatement of the language of the statute, without the

supported basic finding of public need for the proposed service is plainly insufficient. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 533; *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177; *Florida* v. *United States*, 282 U. S. 194; *Atchison, Topeka & Santa Fe Railway Company* v. *United States*, 295 U. S. 193; *Colorado-Wyoming Gas Company* v. *Federal Power Commission*, 324 U. S. 626. The order should have been vacated by the District Court.

4. The District Court concluded that "one finding appears to be without substantial support." To begin with, the Court fails to identify the deficient finding. While, concededly, the absence of substantial evidence to support an immaterial finding will not invalidate an order or require that it be remanded, it is impossible to determine, from the opinion of the District Court, whether the omitted finding is, in fact, immaterial. Clearly, if the Commission's order was not sustained by any fact upon which it was predicated, it should have been remanded for further proceedings so that additional findings of fact could be made or, alternatively, that the Commission reverse its earlier decision. To remand the case to the Commission would not amount to "marching the king's men up the hill and then marching them down again" (Appendix "A", p. 33), but marching the men over the hill.

This court has not hesitated to remand a case to an agency for a necessary finding. *Securities Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80.

The District Court attributes to the Interstate Commerce Commission a prescience which, prior to the Administrative Procedure Act, insured almost automatic enforcement of an agency order. But the enactment of the Administrative Procedure Act imposes a new responsibility upon a reviewing court. *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474; *Pittsburgh S.S. Co.*

v. *National Labor Relations Board*, 180 F. (2d) 731, aff'd 340 U. S. 498.

In determining whether or not an order is supported by substantial evidence, it is the function of the Court to "take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 487-488.

Under the Administrative Procedure Act, the reviewing court has the duty to make clear and explicit findings and the standards of clarity established for administrative decisions must now be applied to the reviewing courts. In short, the Supreme Court "must know what a decision means" before it can say that the District Court was "right or wrong." *United States* v. *Chicago Milwaukee St. Paul & Pacific Railroad Company*, 294 U. S. 499.

In one other particular the District Court has disregarded the lesson of *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474. Nowhere has the reviewing court given weight to the findings of the Examiner and Division 4. The decision of the Commission reveals that no consideration was given to the Examiner's report and no explanation tendered as to why and how it arrived at a conclusion directly contrary to the one recommended by the Examiner and approved by Division 4.

5. In the course of the proceedings in the District Court, the appellants requested an admission that the Commissioners did not read, review and consider the whole record. While the answer to the complaint admitted that the members of the Commission did not read the entire record, it denied that the whole record was not reviewed and considered by the members of the Commission. If, indeed, the Administrative Procedure Act was calculated to broaden judicial review, then this objective can never be achieved unless there is an efficient way of determining whether the whole record was reviewed by the administrative agency. Concededly, this may place an onerous duty upon the agency

and its members, but the burden, if any, must be removed by the Congress and not the courts.

The request for admissions was not designed to probe the Commission's mental processes. The appellants did not ask whether the Commissioners read each page of the record or thumbed them through. The appellants merely inquired whether the record was before each of the Commissioners. Plainly, if the Commissioners admitted that the record was not before them at any time, it must be implied that they did not review and consider it. Conversely, if the record was before each Commissioner or the Commissioners had access to the record the doctrine of the *Fourth Morgan* (*United States* v. *Morgan*, 313 U. S. 409) case might foreclose inquiry as to the extent of consideration to the record given by each Commissioner. But the mere statement by the Commission that its decision is based on the whole record is not binding. *United States of America ex rel., May Johnson* v. *Shaughnessy*, 336 U. S. 806.

Clearly, if the transcript and the exhibits were burned in the docket room before they were requisitioned by the Commission and the Commission then issued an order, that order could not be sustained as one based on the whole record. It seems plain that one should be permitted to inquire whether the record was before the agency before the order was issued. *Weekes* v. *O'Connell*, 304 N. Y. 259. Appellants do not seek a reversal of the doctrine enunciated by this Court in *United States* v. *Morgan*, 313 U. S. 409. In that case, this Court held only that one may not inquire as to the extent to which an administrative officer considered the record or what mental conclusions he arrived at, but it did not say that a litigant was foreclosed from inquiring whether the administrative officer did, in fact, consider the record.

All that the appellants seek by the requests is to determine whether the Commissioners had the record and the opportunity to "dip" into the record and not how far or how deep

the "dip" was. This limited inquiry cannot be equated with a probing of mental processes.

It is no answer to the Appellants' demand for an admission that an agency may employ or rely upon subordinates. The Administrative Procedure Act was designed to correct the abuse of reliance by agency members solely upon a summary or analysis prepared by an anonymous assistant. The availability of the record is a minimum requirement for the proper discharge by an agency of its quasi-judicial function. Administrative Procedure Act, Legislative History, Senate Document No. 248, page 272, page 86; *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474.

As one authority has said:

> "The framing of the opinion can be left to outside hand. But the man who decides the language has to have a sense of the record. He may not have to pore over the record as a whole, but he has to know what is in the record, what the issue is and to reach his own conclusion with reference to it."
>
> Landis, Symposium on American Administrative Law, 9 Am. L. School Rev. 181, 182;
>
> See, too, Landis, The Adminisrative Process, pp. 105-106.

CONCLUSION

It is respectfully submitted that the decision of the District Court fails to recognize that the Commission may not approve a Section 5(2)(b) application unless there is a finding of public need for the proposed unified service and the order is otherwise bottomed upon basic findings supported by substantial evidence; that an order of the Commission cannot be sustained if one material finding is not supported by substantial evidence; that the decisions of this Court do not foreclose one who challenges an order of an

administrative agency from inquiring whether or not t
agency reviewed or considered the record.

Appellants believe that the questions presented by th
appeal are substantial and of importance not only to t
public generally, but to the Interstate Commerce Comm
sion and those who are regulated by, and practice befo
that agency.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for M & M TRANSPORTATI
COMPANY and STONE'S EXPRESS, IN
Appellan

July 22, 1955.

APPENDIX A

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

CIVIL ACTION No. 54-353-M.

M. & M. TRANSPORTATION COMPANY AND STONE'S EXPRESS, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

Before:

MAGRUDER, *Circuit Judge,* and MCCARTHY and ALDRICH, *District Judges.*

HERBERT BURSTEIN, for Plaintiffs.

JAMES E. KILDAY, JOHN H. D. WIGGER, STANLEY N. BARNES, Assistant Attorney General.

ANTHONY JULIAN, United States Attorney, for the United States of America.

EDWARD M. REIDY, Chief Counsel, for the Interstate Commerce Commission.

OPINION OF THE COURT

January 14, 1955

MAGRUDER, *Circuit Judge.* This action was brought by two motor common carriers pursuant to 28 U. S. C. §§ 1336, 2321-2325 to set aside and enjoin enforcement of orders of the Interstate Commerce Commission authorizing the acquisition by St. Johnsbury Trucking Company, Inc., of St. Johnsbury, Vermont, of a portion of the operating rights of Hinsch Transportation Co., Inc., of New York, N. Y., and further authorizing acquisition of control of these operating rights by certain individuals, shareholders of St. Johnsbury.[1] The effective date of the Commission's orders authorizing the acquisition has been extended to 30 days after final judgment in the instant proceeding.

Briefly, prior to the acquisition St. Johnsbury was authorized by certifiate No. MC-108473 to transport general commodities, with certain exceptions, over regular routes between Boston and Springfield, Mass., and a variety of points in Massachusetts, Vermont, New Hampshire, and Maine, and over irregular routes between points in Vermont and points in Rhode Island, Massachusetts, Connecticut, and New York. Under its certificate, No. MC-55888 Hinsch was authorized to operate as a motor common carrier of general commodities, with certain exceptions, over regular routes between the New York metropolitan area and Boston and Springfield, Mass., serving a variety of intermediate points.

On November 27, 1951, St. Johnsbury and Hinsch jointly applied for the Commission's approval of the acquisition of most of Hinsch's rights by St. Johnsbury for $75,000.

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[1] Harry D. Zabarsky et al.—Control; St. Johnsbury Trucking Company, Inc.—Purchase—Hinsch Transportation Co., Inc., 60 M.C.C. 129 (1954) modifying 59 M.C.C. 747 (1954), rev'g 59 M.C.C. 419 (1953).

The statutory provisions relevant to this acquisition are §§ 5(2)(a), (b), (c), and (e) of the Interstate Commerce Act, 49 U. S. C. §§ 5(2)(a), (b), (c), and (e).

On December 18, 1951, the Commission granted St. Johnsbury temporary authority under 49 U. S. C. § 310a(b) to operate under the Hinsch rights for a period of 180 days. This temporary authority was later extended, and in a proceeding before this court the extension was held to have been without authority and was enjoined. *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955 (1954). This injunction has been stayed pending appeal by the Commission to the Supreme Court. St. Johnsbury is presently serving Hinsch points under this temporary authority and did so during the period when its application for permanent acquisition was being processed before the Commission.

An extended hearing on the application for permanent acquisition was held before a trial examiner at which many competing carriers throughout the New York to Maine area appeared to protest the proposed acquisition. The examiner recommended that approval not be given to acquisition of the major portion of the Hinsch rights, under which he found Hinsch had conducted almost no operations and which, if granted, would permit St. Johnsbury to perform a new and entirely different service in a territory now adequately served by existing carriers. The examiner recommended approval of acquisition of Hinsch rights between the New York metropolitan area and points in Maine, via Boston. As to this service, the examiner found that it would serve the needs of shippers, that it had not been sufficiently established by the protestants that St. Johnsbury's entry into this area would substantially impair the financial position of existing carriers, and that Hinsch had interchanged some shipments with other carriers for delivery to points in Maine.

Upon review by Division 4 of the Commission, at which both the applicant and the protestant carriers filed excep-

tions to the examiner's proposed report, it was held that the acquisition of any of the Hinsch rights by St. Johnsbury would not be consistent with the public interest and therefore should be denied. The Division accepted the examiner's conclusions as to the major portion of the rights, but found that, as to the limited New York to Maine authority, the evidence of shipper convenience did not establish a need for such service, the service would bear little resemblance to that which Hinsch formerly rendered alone or by interchange, the purchase price would have little justification based on Hinsch's past operations, it did not appear that the limited operation would be economically practicable, and entry of St. Johnsbury might jeopardize existing carriers, many of which already suffered high operating ratios (i.e., ratios of current expense to current income).

Upon reconsideration by the full Commission, the decision by Division 4 was reversed and the acquisition found to be authorized by the Act. Certain relatively minor exclusions were made in the rights to be acquired. By a later order, the Commission excluded operations by St. Johnsbury between northern New York and certain intermediate Hinsch points in Connecticut and Rhode Island, finding that Hinsch had rendered little or no service to these points.

Petitioners have in their complaint assailed the order of the Commission on a number of grounds, but principally petitioners argue that the Commission's "basic" findings underlying the "ultimate" statutory findings are inadequate to support the ultimate findings and that such basic findings as the Commission did make are not supported by substantial evidence on the whole record.

The courts have continually asserted that the discretion of the Commission in a § 5 proceeding is sweeping, Congress intending that the Commission exercise its expert knowledge in assuring consistency with the public interest, and the exercise of this discretion will not be disturbed if the Commission's findings are adequate in vew of the statutory re-

quirements. See, *e.g., McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86-88 (1944); *Herrin Transp. Co.* v. *United States,* 108 F. Supp. 89, 93-95 (E. D. La. 1952), aff'd Per Curiam 344 U. S. 925 (1953); cf. *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 530-33, 535-36 (1946). But it is not enough that the Commission find, as it did find, the ultimate facts required by § 5 (i.e., that "the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest," that the terms and conditions of acquisition are "just and reasonable," [2] and that the transaction will not "result in an increase of total fixed changes, except upon a specific finding by the Commission that such increase would not be contrary to public interest"). On review, an order should be set aside if it does not contain the "basic" or "essential" or "quasi-jurisdictional" findings necessary to support its conclusions. *E.g., Florida* v. *United States,* 282 U. S. 194, 208-09, 212-15 (1931); *United States* v. *Chicago, M., St. P. & Pac. R. R. Co.,* 294 U. S. 499, 504-05, 510-11 (1935); *United States* v. *Pierce Auto Freight Lines, Inc., supra* at 533; *Secretary of Agriculture* v. *United States,* 347 U. S. 645, 652-54 (1954). Compare *Beaumont, S. L. & W. Ry Co.* v. *United States,* 282 U. S. 74, 86-87 (1930). See our reference to this matter in *New York Central R. R. Co.* v. *United States.* 99 F. Supp. 394, 400-01 (1951).

The nature of the required basic-findings is in part stated, in part suggested, by the statute. Section 5(2)(c) prescribes that the Commission should give weight to, among other considerations, "(1) The effect of the proposed transaction upon adequate transportation service to the public; * * * (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the car-

[2] The precise statutory language is, "If the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable * * * it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *."

rier employees affected." And by requiring ultimate findings of "public advantage" or "public convenience and necessity" to support similar transactions, Congress by implication has indicated that these findings need not be made in an acquisition proceeding involving only motor carriers.[3] The Supreme Court has several times mentioned other factors which should be reflected in the Commission's basic findings in a § 5 proceeding. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 23, 25 (1932) ("economy and efficiency in operation"; "adequacy of transportation service"); *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86-88 (1944) (improving adequacy of service, but Commission need not find that existing service is inadequate; Commission should consider diminution of competition).

Here the Commission made extensive findings which clearly meet the requirements established under the statute. With regard to the promotion of efficient operations by the acquisition, it found that although St. Johnsbury's interchange with other carriers of full truckloads had, with some delays, been generally satisfactory, interchange of less than truckloads had not been satisfactory and attempts made by St. Johnsbury to remedy this situation had not succeeded; that Hinsch's preponderance of northbound traffic and St. Johnsbury's preponderance of southbound traffic, if unified, were expected to afford a balanced operation and provide a unified service, operating more efficiently, eliminating facility duplication, without materially

[3] Section 5(2)(b) provides that if a railroad is an applicant for acquisition of a motor carrier, the Commission must find not only consistency with the public interest but also that the acquisition will enable the railroad "to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." Where application is made for a new motor carrier certificate, the Commission must find the applicant "fit, willing, and able" and that the proposed service "is or will be required by the present or future public convenience and necessity * * *." Section 207, 49 U.S.C. § 307.

increasing operating costs; that St. Johnsbury's earnings were greater on shipments between Vermont and the New York metropolitan area via Springfield or Albany, which would be permitted under the Hinsch license, than via Boston, its only gateway for present regular service; and that St. Johnsbury was financially more sound and a more efficient operator than Hinsch. As to the scope of the Hinsch operations, the Commission found that Hinsch operated primarily between New York City and Boston but participated in shipments to and from points in Massachusetts, Connecticut, Rhode Island, and the New York metropolitan area; that Hinsch operated on a scale commensurate with its resources and facilities; and that Hinsch interchanged some shipments both at New York City and Boston and at intermediate points. With regard to the desires of shippers in the area in question, the Commission found that, if the acquisition were approved, St. Johnsbury would institute overnight through service between New England and the New York metropolitan area in response to the requests of shippers; and that shippers' testimony was generally that they would continue to utilize St. Johnsbury's through single-line service if the acquisition were approved. With regard to the reasonableness of the purchase price for the Hinsch rights, the Commission found that Hinsch had continually conducted some operations within its authority, from which it derived annual gross operating revenues in excess of $200,000; that this amount of traffic was of some going-concern value; that had the operations been unified in 1951 St. Johnsbury's net income for that year would have increased an amount estimated to be approximately 10 percent of the purchase price; and that the purchase price did not appear to be excessive, and payment should not prove improvident or unduly burdensome. With regard to the effect of the acquisition upon competing carriers, the Commission found that the probability that St. Johnsbury, as a more aggressive carrier, would become a more substantial competitor by providing single-line service in lieu of interline service, did not necessarily preclude ap-

proval; that most of the protestant carriers had increased operating revenues and net income since 1948, and it did not appear that they had lost or would lose sufficient traffic to affect their operations materially; and that the available traffic was ample to support continuation of a part of Hinsch's operations, as unified with St. Johnsbury, as well as the operations of competing carriers.

Petitioners contend the findings are inadequate essentially because there is no finding (1) that a public need existed for the unified service, (2) that the existing service was inadequate, and (3) that a new service was not created by the acquisition. They claim that prior Commission decisions which they maintain require these findings (1) are entitled to weight in interpreting the ambiguous ultimate requirement of consistency with the public interest and (2) must be adhered to by the Commission or specifically announced as abandoned. Those contentions are without merit for several reasons: First, the Commission findings, although not made in the precise language urged, largely meet the petitioners' objections. Second, it is not entirely manifest that the Commission in the instant case departed from carefully enunciated prior principles. Petitioners rely to a great extent on *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc.*, 57 M.C.C. 541 (1950). There the proposed acquisition was opposed not only by competing motor carriers but by the transcontinental railroad systems and certain grain interests. The Commission found that aggressive competition by the applicant on a trans-continental basis might seriously impair the economic operation of the railroads and result in higher rates, not only with respect to carriage of commodities which the motor carriers might solicit, but also as to commodities which must necessarily be transported by rail. It is true that the order also stated as additional reasons for denial that motor competitors might suffer adversely, that since the applicant had inter-changed little traffic acquisition would result in a new service, and that the

resulting service would serve no proved public need. There is also a statement to the effect that the standards adopted in an application for new operating authority under § 207 should be applied in a § 5 proceeding to require denial of a proposed acquisition where no public need is shown, a new service would result, and existing carriers seem able to perform adequate service. However, on rehearing (57 M.C.C. 467 (1951)) some of this language was withdrawn, and in its report on reconsideration in *J. W. Ringsby —Control; Ringsby Truck Lines, Inc.—Control—Northern Transportation Co.*, 58 M.C.C. 594 (1952), the Commission further limited the application of the *Pacific Intermountain Express* decision. Third, even if the latter case had not been limited by later decisions, the asserted inconsistency between the instant result and that in the *Pacific Intermountain Express* case would not require setting aside the Commission order. The courts have many times held that the findings of the Commission may not be attacked because they are inconsistent with findings made in other cases. *E. g., Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775 (1931); *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663 (1926); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271 (1926). Cf. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223, 228 (1946). Petitioners cite *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954), for the proposition that the Commission must explain a departure from prior decisional principles. In this case an order was vacated primarily because of the inadequacy of the Commission's findings to explain the legal basis of its decision. The Court was unable to tell from the order what the Commission meant, and when the Court looked at prior decisions of the Commission it found them inconsistent with the result reached. While the Court did say (at p. 653) that "the Commission has not adequately explained its departure from prior norms," this became important only because the findings given were inadequate. Thus it would appear that, had the basic findings of the order been

adequate, the Court would not have reached the question whether the Commission had without explanation departed from prior decisional norms. See *Barrett Line, Inc.* v. *United States,* 326 U. S. 179, 201-02 (1945). In the same way this court, in *New York Central R. R. Co.* v. *United States,* 99 F. Supp. 394 (1951) looked to prior Commission decisions not to require an explanation of inconsistency but in an attempt to understand the basis of the decision where the findings were either unclear or not made. Where, as in the instant case, the findings are on their face adequate and explain the basis for decision, there is no occasion to examine consistency with prior decisions. Fourth, while the inconsistency of prior Commission decisions might stimulate judicial examination of the Commission's interpretation of a statute, see *Barrett Line, Inc.* v. *United States, supra,* at 190-93, 196-98, it is not possible here to hold that the statute's "consistent with the public interest" requires the basic findings urged by petitioners.[4]

A reviewing court's inquiry as to the evidentiary support for Commission findings is limited to determining whether there is substantial evidence for the findings on the whole record or such portions as may be cited by a party. (5 U. S. C. § 1009 (e) (§ 10 (e) of the Administrative Procedure Act).) We assume, without deciding, that this is a case "reviewed on the record of an agency hearing provided by statute." See *Herrin Transp. Co.* v. *United States,* 108 F.

[4] The distinction between § 5s "consistent with the public interest" and § 207's "public convenience and necessity" disposes of the contention as to a finding of public need. And even within § 5, it is evident that Congress intended a distinction between "public interest" and "public advantage." Petitioners' argument that the Commission must find the existing service inadequate in a § 5 proceeding has been rejected by the Supreme Court. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86-87 (1944). Lastly, it would not seem that the creation of a new service would be inconsistent with the public interest—on the contrary, it might greatly benefit the public. If petitioners' argument were to prevail, acquisitions would be limited to those involving non-contiguous carriers, or carriers which substantially interchanged all through traffic with one another.

Supp. 89, 94 (E. D. La. 1952), aff'd Per Curiam 344 U. S. 925 (1953). Petitioners attack substantially all the Commission findings on this ground. Although the record contains some conflicting evidence, all the important basic findings made by the Commission are supported by substantial evidence on the whole record. One finding appears to be without substantial support, but we have not the slightest reason to infer that without this finding the Commission's ultimate conclusion would have been any different. Even without this one questionable finding we would uphold the order of the Commission. It would be judicial administration amounting to nothing more than "marching the king's men up the hill and then marching them down again." [5] to set aside the order of the Commission for this reason. See *Bethlehem Shipbuilding Corp. Ltd.* v. *National Labor Relations Board*, 114 F. 2d 930, 935 (C. A. 1st, 1940), quoting *N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 247 (1939).

A judgment will be entered dismissing the complaint.

ALDRICH, District Judge, concurs in the result. ALDRICH, *D. J.*, Concurring:

I am willing to concur, albeit reluctantly, that the complaint should be dismissed. This hesitation is due to the fact that I find it a little difficult to assume as readily as does the majority that there is "not the slightest reason to infer that without one finding," which the court finds to be without substantial support, the Commission's ultimate conclusion would have been any different. Basically the Commission made few findings of the sort required to support its order. The finding which I understand the majority concedes to be unwarranted in the relatively brief supportative part of the Commission's opinion appears twice. It is with reluctance that I conclude that without it the ultimate decision would have been the same. Indeed, were it not for the heavy burden on the plaintiffs I would reach the opposite result.

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[5] *City of Yonkers* v. *United States*, 320 U. S. 685, 694 (1944).

What troubles me more seriously are certain observations in the majority opinion dealing with the meaning and interpretation of § 5's "consistent with the public interest."

The Transportation Act of 1920 was a relatively simple affair. The act has grown into its present comprehensive and complex condition sporadically. The almost inevitable result is that an entirely uniform meaning and purpose, if it still exists, is hard to discover. This seems particularly so with respect to the elusive phrase "consistent with the public interest."

As I read its opinion, the majority is at least receptive to the idea that "consistent with the public interest" as used in § 5 is to be equated with the phrase "not inconsistent with the public interest"—in other words, that it is a mere neutral status. While this is not an impossible result, both the history of the act and such principles of uniformity of construction as it now permits lead me to the opposite conclusion.

Before the Commission under the Transportation Act of 1920 could approve joint ownership or control there had to be a finding that it "will be in the public interest," or that the "public interest will be promoted." Ch. 91, § 407, 41 Stat. 481. In the subsequent amplification and reenactment of these provisions these phrases were displaced with "will be consistent with the public interest," "to public advantage," "would not be contrary to public interest." 49 U. S. C. A. § 5 (2) (b) and (c). The extent that this introduced new meanings is the question. Although the wording was changed, I believe that fundamentally the same result was intended. Not that "consistent with the public interest" means "public convenience and necessity," or even, as contended by plaintiffs here, "public need," but that it at least means something positive. In other words, I think "consistent with" means "*in* the public interest," and something more than the mere negative "not inconsistent." The phrase used once, "public advantage," which the majority

distinguishes, I believe is a grammatical, and not a semantic difference.

No purpose will be served by my laboring this matter, except to note that all that is required for the Commission to approve a complete merger under § 5 (2) is that it be consistent with the public interest, whereas mere joint agreements under § 5 (1) require a showing of better service to the public, or of economy in operation, and that they will not unduly restrain competition. Consequently a neutral interpretation of § 5 (2) would seem to make a complete merger more easily endorsable than a joint agreement. I would not care to uphold decisions under § 5 (2) that have only neutral findings to support them.